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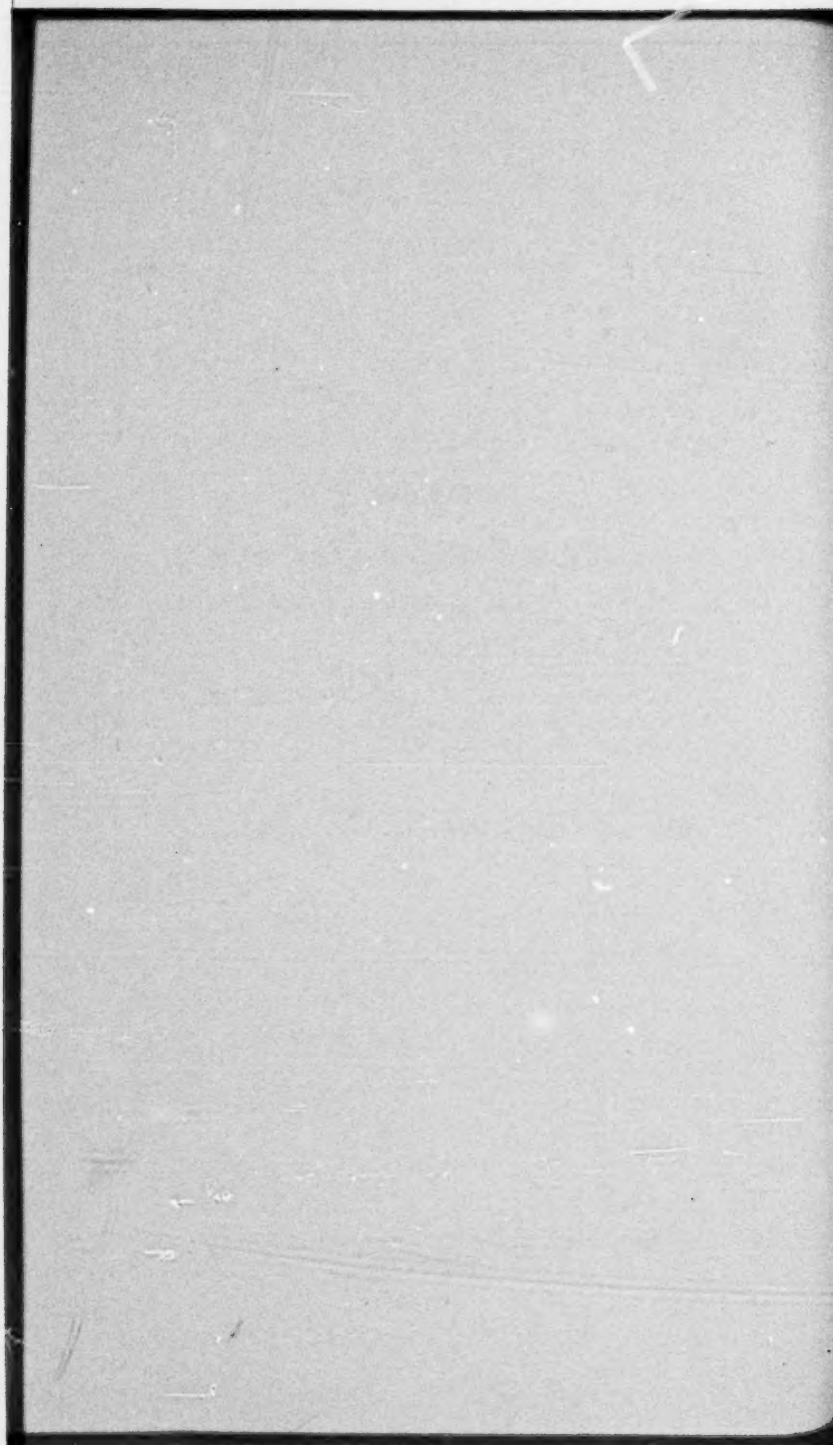

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 45

NEW PITTSBURGH COAL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 52-55) is reported at 200 F. 2d 146. The findings of fact and conclusions of law of the District Court (R. 10-16) are reported at 99 F. Supp. 253.

JURISDICTION

The judgment of the Court of Appeals (R. 51) was entered December 1, 1952. A timely petition for rehearing (R. 57-61) was denied by the Court

of Appeals on January 5, 1953 (R. 63). The time within which to file a petition for a writ of certiorari was extended to April 25, 1953, and the petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the taxpayer has established that the cost of certain forty pound rails is deductible as an ordinary and necessary expense under Section 234(a)(1) of the Revenue Act of 1918 in computing taxable net income for 1920.

STATUTE INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057:

> SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:
>
> (1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments required to be made as a condition to the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity;
>
> * * * * *

STATEMENT

This proceeding involves a suit brought in the United States District Court for the Southern District of Ohio by New Pittsburgh Coal Company, an Ohio corporation (herein referred to as the taxpayer), for refund of $11,654.76 paid as federal income tax for the taxable year 1920, all of which depended upon the taxpayer's claim for deduction of various amounts as ordinary and necessary business expenses for that year.[1] (R. 1-6.) From a judgment awarding it a refund of $8,277.64 (R. 17) the taxpayer prosecuted an appeal to the Court of Appeals for the Sixth Circuit, alleging error on the part of the District Court with respect to the disallowance of three items claimed as ordinary and necessary business expenses. The Court of Appeals reversed the District Court as to one item claimed as a deduction and affirmed as to the other two items (R. 52-55), one of which is now abandoned (Pet. 4).

The one item still in controversy is an expenditure, in aggregate, of $4,866.83 in 1920 for forty pound mine rails. (R. 12, 16, 17.) The District Court found generally that at the time the expenditures originally involved were made the taxpayer's mines had been fully developed and equipped to their predesigned and normal output capacity (R. 13-14), and made specific findings with respect to the several items of expenditure claimed as deductions (R. 14-15). With respect to

[1] Incredibly, the dispute has already continued for more than thirty-two years.

the forty pound rails here involved the District Court found (R. 14): "There is no evidence as to the exact use made of any of the 40 pound rails in question in this lawsuit." It concluded as a matter of law, with respect to this item and the other items involved in the appeal below, that "Plaintiff has failed to prove that the commissioner improperly charged the following items and amounts to capital." (R. 16.)

ARGUMENT

The record in this case presents no basis for granting a writ of certiorari. Whether an expenditure is deductible from gross income as an ordinary and necessary business expense within the meaning of the statute depends upon the facts of the particular case (*Welch* v. *Helvering,* 290 U.S. 111), and in a suit for refund of income taxes the burden is upon the taxpayer to prove he has overpaid his tax. (*Lewis* v. *Reynolds,* 284 U.S. 281).

The decision of the District Court in the instant case, so far as the question here involved is concerned, was based entirely upon the taxpayer's failure to prove the use made of the forty pound rails (R. 14, 16), and its decision was affirmed by the Court of Appeals solely on that ground. It said (R. 54):

> We can not assume, without proof of some sort, as contended by the taxpayer, that since coal was being mined and the face of the mine receding, these rails were used in order to maintain normal output.

Since the decision in the instant case was based solely on a failure of proof, there is no merit to the contention (Pet. 8) that the decision is in conflict with, or would establish a different rule from that prevailing as a result of, the decisions in *Marsh Fork Coal Co.* v. *Lucas,* 42 F. 2d 83 (C.A. 4th); *Parkersburg Iron & Steel Co.* v. *Burnet,* 48 F. 2d 163 (C.A. 4th); *Fidelity-Phenix Fire Ins. Co.* v. *Benedict Coal Corp.,*64 F. 2d 347 (C.A. 4th) (which did not involve federal taxes); *United States* v. *Roden Coal Co.,* 39 F. 2d 425 (C.A. 5th); and *Commissioner* v. *H.E. Harman Coal Corp.,* 200 F. 2d 415 (C.A. 4th). On the contrary, the court below clearly recognized and applied the rule of the above cases to the extent permitted by the facts, and also held that it had been properly applied by the District Court in this case. Furthermore, the decision of the Court of Appeals for the Fourth Circuit in *Commissioner* v. *H. E. Harman Coal Corp., supra,* clearly demonstrates the factual nature of these cases.

This is plainly an isolated case involving only a small amount of tax and does not present any issue of general importance.

CONCLUSION

The decision below is right. It is fully supported by the facts and the law and is not in conflict with any other decision. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY, 1953.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 262434 12

Office - Supreme Court, U.
FILED
SEP 28 1953
HAROLD B. WILLEY, Cler

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NEW PITTSBURGH COAL COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

REPLY BRIEF.

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REPLY BRIEF.

The brief in opposition is grossly unfair in that it assumes that the record shows a failure of proof of facts necessary to bring the case within the March Fork rule of the Fourth and Fifth Circuits.

By the briefer's own admission (Br., 4), the decision below rests "solely" on the alleged failure to prove one fact, to wit "the use made of the forty pound rails." This

admission must stand corrected (R., 14), to read "exact use." Such a decision, if allowed to stand, would be in conflict with the long established Marsh Fork rule of the Fourth and Fifth Circuits. (Pet., 9.)

In all fairness the District Court's finding of facts as to the "**exact** use made of **any** of the 40 pound rail" must be read in the light of the government's original determination disallowing the expense.

> "This mine rail is used generally on the main entries. It is not shown that the rail purchased was used for the purpose of repairing the existing haulage track. It is probable that the permanent track was extended. The main haulage roads serve the entire tonnage and any additions thereto constitute improvements. Where a company has adopted a policy of charging similar costs to expense each year after the stage of operations has been reached it should be continued. In this case it has not been shown that the past practice has been to charge such costs to operations. It appears, therefore, that this cost properly belongs in the capital account." (Pet., 6.)

The testimony in the District Court clearly established that 40 pound rail was in fact (as assumed by the government) used in the main entries. (Pet. 8, wherein "such" in the seventh line should read "much".) In short, the inexactness is that the taxpayer made no effort to prove that any of the rails were used for repairs rather than extension of the permanent track. But this is immaterial as demonstrated by the government's own further statement (Pet., 6) that "where a company has adopted a policy of charging similar cost to expense * * * **it should be** continued." (Such adopted policy was proven without dispute in the District Court.) The government was correctly stating the long established rule of the Marsh Fork case, recently approved in the Harmon case. The decision below, if

allowed to stand, would be in conflict and would create serious accounting problems for mining companies.

Throwing logic to the winds, the briefer asserts (Br., 5), that since the instant decision was based on a failure of proof it cannot be in conflict with the established Marsh Fork rule of the Fourth and Fifth Circuits—an obvious non sequitur. Clearly, if the fact **not** proved in the instant case (to wit the "exact" use as between repair and extension of the permanent haulage ways) does not **need** to be proved under the Marsh Fork rule, the instant decision is in conflict.

With further reference to page 5 of the opposing brief:

1. It is not true that the Harmon case "clearly demonstrates the factual nature of these cases." Rather the Harmon case, approving Marsh Fork, clearly demonstrates that the "exact use" in the instant case is quite immaterial. (Pet., 9.) Therefore the decision is in conflict with the long established rule of the Fourth and Fifth Circuits.

2. It must be apparent that this is not "an isolated case," but a case of general importance not only because of the conflicting rule but because of the serious accounting problems that would be created for mining companies, who could not enter expenditures on their books in accordance with established accounting methods prescribed in detail by the Marsh Fork decision; but would be required to wait until the items had been actually used and their "exact" use thereby established. This would be an impracticable process of retrospective accounting not contemplated by the statutes and regulations. Article 222 of Regulations and the rule **as expressed** in the Marsh Fork decision contemplate a prospective accounting in cases within the regulations.

3. The mere statement of the questions presented (Pet., 2), refutes the briefer's contention that this is an isolated case (Br., 5), and clearly demonstrates that the issue is of general importance.

CONCLUSION.

The decision below is in conflict with the decisions of the Fourth and Fifth Circuits, involving a question of general importance to all mining companies, who, we anticipate, will wish to proffer at the proper time a brief on the merits.

Respectfully submitted,

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